

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BERT DAWSON)	
Decedent)	
VS.)	
)	
DAWCO MANUFACTURING COMPANY, INC.)	Docket No. 101,065
Respondent)	
AND)	
)	
ROYAL INSURANCE COMPANIES)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the January 17, 2003 Order entered by Administrative Law Judge Jon L. Frobish. The Board heard oral argument on July 18, 2003, in Wichita, Kansas. Gary M. Peterson of Topeka, Kansas, was appointed and participated in this appeal as Board Member Pro Tem.

APPEARANCES

Martin E. Updegraff of Wichita, Kansas, appeared for the decedent's surviving spouse, who following decedent's death was named conservator of their minor children. Mr. Updegraff also appeared for decedent's dependent son, Bryce B. Dawson. Terry J. Torline of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board in this appeal includes the transcript of the hearing held before Judge Frobish on January 16, 2003, and the transcript and attached exhibits of the December 22, 1983 settlement hearing.

For purposes of this proceeding, the parties have agreed to the following facts:

1. The decedent died as the result of an August 28, 1983 work-related accident.
2. Decedent was survived by a spouse and two minor children.

3. Respondent and its insurance carrier agreed to pay claimant's dependents the maximum amount provided by the Workers Compensation Act.
4. The benefits to decedent's spouse and daughter have ceased and are no longer payable.
5. On July 2, 2000, decedent's younger child, Bryce B. Dawson, celebrated his 18th birthday but has continued to be enrolled as a full-time student in an accredited school of higher education.
6. As of July 2, 2000, respondent and its insurance carrier had paid in excess of \$100,000 in compensation to the surviving spouse and dependent children.
7. Respondent and its insurance carrier are continuing to pay benefits to decedent's son.

ISSUES

On November 21, 2002, respondent and its insurance carrier filed an Application for Review and Modification of the December 22, 1983 settlement hearing award entered in this claim. The application stated, in part:

The respondent and insurance company believe that they have satisfied all of their obligations under the friendly settlement award and desire to have a determination made that they owe no further benefits to the claimant's dependant *[sic]*.

In the January 17, 2003 Order, Judge Frobish interpreted K.S.A. 1983 Supp. 44-510b(a)(3) and (h) and determined that the \$100,000 cap on death benefits did not apply to a child who had reached 18 years of age and who was attending school at an accredited institution. Accordingly, the Judge ordered respondent and its insurance carrier to continue to pay death benefits to Bryce B. Dawson. The Judge did not address Mr. Updegraff's request for attorney fees.

Respondent and its insurance carrier contend Judge Frobish erred. They argue that the Workers Compensation Act is clear and unambiguous that Bryce B. Dawson's benefits should have terminated on his 18th birthday due to the \$100,000 cap. Consequently, they request the Board to reverse the January 17, 2003 Order by determining their obligation to pay death benefits ceased July 2, 2000.

Conversely, the attorney for the surviving spouse and son argues that the statutes in question should be interpreted as requiring compensation to be paid to decedent's son until he reaches 23 years of age as long as he attends an accredited institution of higher

learning. Accordingly, Mr. Updegraff requests the Board to affirm the January 17, 2003 Order and, in addition, grant him an award for attorney fees.

The only issues on this appeal are (1) whether decedent's son, who reached 18 years of age in July 2000, is entitled to continue to receive workers compensation benefits despite the fact that benefits totaling more than \$100,000 have been paid to decedent's surviving spouse and two children and (2) what amount, if any, should be awarded for Mr. Updegraff's attorney fees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and having considered the arguments and briefs of the parties, the Appeals Board finds as follows:

Decedent's son, Bryce B. Dawson, is no longer entitled to receive weekly compensation benefits as he has reached 18 years of age and the maximum amount of compensation benefits payable under K.S.A. 1983 Supp. 44-510b(h) has been paid. Consequently, the January 17, 2003 Order is reversed.

K.S.A. 1983 Supp. 44-510b(h) provides:

Notwithstanding any other provision in this section to the contrary, the maximum amount of compensation benefits payable under this section to any and all dependents by the employer shall not exceed a total amount of \$100,000 and when such total amount has been paid the liability of the employer for any further compensation under this section to dependents, **other than minor children of the employee**, shall cease except that the payment of compensation under this section to any minor child of the employee shall continue for the period of the child's minority at the weekly rate in effect when the employer's liability is otherwise terminated under this subsection and shall not be subject to termination under this subsection until such child becomes 18 years of age. (Emphasis added.)

This statute is clear and unambiguous in stating that death benefits terminate when a surviving minor child becomes 18 years of age "notwithstanding any other provision in this section to the contrary." The decedent's surviving spouse and son argue that children are entitled to receive death benefits until they reach the age of 23, if enrolled in an accredited institution of higher education or disabled, citing K.S.A. 1983 Supp. 44-510b(a)(3). That statute provides:

Any wholly dependent child of the employee shall be paid compensation, **except as otherwise provided in this section**, until such dependent child becomes 18 years of age, except that any such dependent child who is not physically or mentally capable of earning wages in any type of substantial and gainful employment, or who

is enrolled as a full-time student in an accredited institution of higher education or vocational education shall be paid compensation until such dependent child becomes 23 years of age. (Emphasis added.)

The above-quoted statute provides that its provisions apply to "any wholly dependent child of the employee . . . except as otherwise provided in this section." Consequently, K.S.A. 1983 Supp. 44-510b(a)(3) only controls if the situation is not otherwise specifically addressed. But K.S.A. 1983 Supp. 44-510b(h) is such an exception. Accordingly, once the maximum amount of compensation benefits has been paid, the exception for children as provided in K.S.A. 1983 Supp. 44-510b(h) applies and that statute controls.

Consequently, the Board concludes that the obligation to pay benefits to Bryce B. Dawson terminated as of his 18th birthday, July 2, 2000, as respondent and its insurance carrier had paid the maximum benefits required by K.S.A. 1983 Supp. 44-510b(h). Accordingly, respondent and its insurance carrier have satisfied their obligation to pay benefits in this claim.

The January 17, 2003 Order is silent as to attorney fees. The Board does not take that silence to suggest the Judge determined that no fee was appropriate. The Board finds this matter to be within the purview of K.S.A. 44-536. As such, Mr. Updegraff is entitled to reasonable attorney fees for his services associated with respondent and its insurance carrier's request to terminate benefits. But the record does not indicate the total time that Mr. Updegraff spent in this matter. Consequently, the Board must remand this matter to the Judge to determine a reasonable attorney fee.

AWARD

WHEREFORE, the Board reverses the January 17, 2003 Order as the Board determines that respondent and its insurance carrier's obligation to pay benefits to Bryce B. Dawson has ceased. Further, the Board remands this proceeding to Judge Frobish to determine a reasonable attorney fee.

IT IS SO ORDERED.

Dated this ____ day of July 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Martin E. Updegraff, Attorney for decedent's surviving spouse
 and Bryce B. Dawson
 Terry J. Torline, Attorney for Respondent and its Insurance Carrier
 Jon L. Frobish, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director